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THE JOURNAL
OF
POLITICAL ECONOMY

VOLUME 25 *April 1917* NUMBER 4

LEGALIZING COMBINATIONS FOR EXPORT TRADE

Opposition to combinations in restraint of trade is rooted deep in the American popular opinion. As a part of our heritage from England it found early lodgment, and has been nurtured by the business philosophy that holds freedom of contract and equality of business opportunity to be cardinal principles of fair dealings. This opposition gathered volume through the nineteenth century; it was the great motive power behind the granger movement in the seventies; it gave poignancy to the Interstate Commerce act of 1887; it found fruition in the Sherman Anti-Trust law of 1890.

THE SHERMAN ANTI-TRUST LAW

The proximate causes of this last-named piece of legislation have been carefully assembled. Among them are large-scale production, increased transportation facilities, widening and overlapping markets, cut-throat competition, pools, combinations, trusts. It was the era of great business expansion in the domestic market, with its receding frontier, its exploitation of natural resources, its tide of immigration. Then giants of industry arose in the land, and grasped at the control of fundamental economic activities. Anger, fear, and resentment worked together to fetter these giants by a federal enactment. These feelings are written large in the Sherman Anti-Trust law.

In this law the conditions in the minds of the legislators were clearly those within our own borders; the combinations, the conspiracies to be destroyed were those of the Standard Oil Company, the steel and the whiskey trusts, the railroads, etc. This philosophy of "enforced competition" was to be the philosophy of our "American" business; it was a "for-us-and-our-household" theory. But the eradication was intensive more through intensity of feeling than through deliberation and careful forethought. However indefinite the phrasing in that act is, even a cursory reading shows the desire on the part of its framers to include every species of this "evil."

The judicial interpretation of the Sherman Anti-trust law, especially in more recent decisions, indicate (1) that it is adapted to prevent all kinds of contracts or combinations which directly or hurtfully restrain trade or commerce subject to federal control, or monopolize, or attempt to monopolize it, although the means of restraint employed are so various and changing that it would be difficult to define all of them specifically by statute; (2) that the present judicial interpretation of interstate commerce is such as to leave practically no twilight zone which can be reached either by federal or state law; (3) that combinations of persons in whatever walks of life, in so far as they are engaged in such commerce, are comprehended by the law.[1]

A twilight zone, however, did develop from one phase of the law. Do its terms apply to foreign trade? Do they include both export and import trade? How far these questions defined themselves in the minds of the framers, it is practically impossible to say. "This statute was obviously intended to protect the American consumer. I am informed that the voluminous debates in Congress, which preceded its passage, while covering every possible phase of the subject, failed to suggest or hint in the remotest way that the consumers of other countries were to be protected by the statute."[2] One is very prone to read back into the wording of a law the conditions of the present day. Was there any reason for foreign trade relationships to be in the minds of the framers of the Sherman act? In 1890 there had just been experienced a reversal from that comfortable "balance of trade in our favor," which

[1] Davies, *Trust Laws and Unfair Competition*, p. lii.

[2] John D. Ryan, *First National Foreign Trade Convention*, p. 16.

called for much apprehension on the part of the statesmen of that day. The figures for the few years preceding the passage of the law are given in Table I.

TABLE I

Year	Exports	Imports
1885	$742,189,755	$577,527,329
1886	679,524,830	635,436,136
1887	716,183,211	692,319,768
1888	695,954,507	723,957,114
1889	742,401,375	745,131,652

Such unfavorable figures were enough to cause alarm or at least to arouse agitation. It should be noted particularly that the two years preceding the passage were "against us," for the first time since 1872. There is, of course, no good reason to connect the trusts with our "unfavorable balance" of trade, but there is evidence that foreign trade relations might well have been in the minds of the legislators.

To the evidence of these figures should be added the political upheaval which gave to the Democrats a safe majority, and administered to the Republicans one of the worst defeats in their history, in a campaign whose "paramount issue" was the protective tariff. Much was said in this campaign about foreign relationships and the need for protecting home industries and our laboring men. How far did foreign commerce also enter? The only reply is the wording of the Sherman act itself. It may be argued further, however, that if the Sherman act included foreign commerce, both exports and imports, there would be no need for more legislation on the subject. What does that act say? Was there further legislation?

Section 1 of the Sherman law declares, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, *or with foreign nations*, is hereby declared to be illegal." The very same phrase, "or with foreign nations," occurs in sections 2 and 3. In section 6, the property of any combination mentioned in section 1 *en route* "to a foreign country," is declared to be forfeited, and the

act by section 8 is made to include all "corporations and associations existing under, or authorized by, the laws of the United States—or of any foreign country." What is the significance of these phrases? Did they creep in unnoticed? Surely, with all of its indefiniteness, the Sherman law must have contemplated some kind of foreign commerce.

THE WILSON TARIFF ACT OF 1894

The next act of federal legislation which touches upon this subject is the Wilson Tariff act of 1894. Sections 73–77 of this bill have to do with import trade, incidentally, of course, to the regulation of custom duties. Section 73 declares illegal, void, and contrary to public policy "every combination, conspiracy, trust, agreement, or contract . . . . made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States," whenever restraint of lawful trade, free competition in lawful trade or commerce, or increase of market price results (Wilson Tariff Act of 1894, section 73). Sections 74 and 75 have to do with procedure and jurisdiction, respectively. In section 76 is granted the power to seize and condemn property "imported into and being within the United States," etc. Section 77 is identical with section 7 of the Sherman law.

The effect of this law was further to particularize trust control. Section 73 is the most significant one, and helps to identify the wicked "trust" by its effect upon market price. This entire portion of the law seems very much out of keeping with the purpose of a tariff law "to reduce taxation, to provide revenue for the government, and for other purposes." Its insertion can no doubt be explained by the contemporary political conditions. There was much difficulty, it will be remembered, in getting the Wilson act through the House and Senate. In the end it was "a vague uneasiness about trusts and monopolies, which the protective duties were supposed to promote, [that] clearly had much effect in strengthening the hands both of Democrats and Populists."[1]

[1] Taussig, *Tariff History of the United States*, p. 286.

The Wilson Tariff act, then, is another bit of evidence tending this time to show that the Sherman law was not regarded as covering, adequately at least, the subject of import trade. What trade or commerce with foreign nations can mean, if it does not include import trade, passes comprehension, but that it did not satisfy the legislative mind is apparent. In this connection, moreover, the import and export figures should be inspected. The year preceding the passage of this bill reveals once more an "unfavorable balance":[1]

Year	Exports	Imports
1893.....	$847,665,194	$866,450,922

It will appear from these figures that the international bills "ran against us" for $18,735,728. Imports, it was felt, must be reduced at least proportionately to the exports. Here is another possibility of a connection between the international account and federal legislation.

At any rate, whatever the cause for the legislation, the Wilson Tariff act of 1894 apparently settled the import question. By its terms all combinations for import trade are "contrary to public policy, illegal and void."

JUDICIAL INTERPRETATION

After the passage of these two laws came the problem of interpretation. It was for the courts to determine what constitutes "trade or commerce with foreign nations." As a matter of fact, the issue was never squarely met. (Cases touching upon the foreign commerce phase of the Sherman Anti-Trust act are: *Thomsen* v. *Union Castle Mail Steamship Company et al.*, 166 Fed. 251 [1908]; *American Banana* v. *United Fruit Company*, 213 United States 347 [1909]; *United States* v. *Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft et al.*, 200 Fed. 806 [1911]; *United States* v. *Pacific and Arctic Railway and Navigation Company*, 228 U.S. 87 [1913]; *United States* v. *Hamburg-American S.S. Lines* [1914];

[1] *Statistical Abstracts*, 1915, p. 328.

United States v. *Prince Line, et al.; United States* v. *American-Asiatic S.S. Company et al.*, 220 Fed. 230 [1915].) The case of *Thomsen* v. *Union Castle Mail S.S. Company* was decided by the Circuit Court of the United States in 1908. The plaintiff pleaded that he was injured by the defendant's freight combination, and asked for treble damages under the Sherman Anti-Trust law. The defendant corporation was formed in a foreign country, but ran its freighters from American ports to South Africa. In rendering its decision, the court said:

> A combination of shipowners to prevent competition between members by maintaining uniform freight rates in foreign trade, and to eliminate the probability of competition with other lines by requiring shippers to pay forfeit money in case they patronized other lines, constitutes a combination in restraint of competition and *foreign commerce within the meaning of the Sherman law* [italics mine] . . . . *where a combination in restraint of foreign commerce in violation of the federal anti-trust act* was put in operation in the United States, and *affected her foreign commerce*, it was not material to a suit by a person injured thereby that it was formed in a foreign country. . . . . In an action to recover treble damages caused by an unlawful combination in restraint of foreign commerce, whether the restraint of trade caused by the combination was reasonable or unreasonable was immaterial.

The words seem clearly to say that, in the opinion of the Circuit Court, there was no doubt about the application of the Sherman law to foreign commerce. And since Thomsen was an exporter, the decision would also seem clearly to include export trade.

In 1909, the Supreme Court gave a decision in the *American Banana Company* v. *United Fruit Company*. The question turned upon where the act was done.

> While a country may treat some relations between its own citizens as governed by its own law in regions subject to no sovereign, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done. . . . . A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law [p. 359].

The essence of the decision is that a conspiracy, even though planned in the United States, by a corporation of the United States, when carried out under a foreign jurisdiction and permitted by the

foreign law, does not come within the application of the Sherman Anti-Trust act, however much it may affect the foreign commerce of this country. Why this case should have run back past the Wilson Tariff act of 1894 to the Sherman law of 1890 does not appear, but no reference is made to sections 73–77 of the later law which should undoubtedly have covered the case. The wording of section 73 seems clearly to contemplate actions done outside of the United States (cf. "any article imported or intended to be imported").

All the other cases have to do with transportation problems. It would seem that they should have fallen logically within the jurisdiction of the Interstate Commerce Commission, who have specialized in the carrier problems, just as foreign banks and their problems belong to the Federal Reserve Board, but adjustment was sought at the hands of the court. The *United States* v. *Hamburg-Amerikanische Packet, etc.* case, which came before the Circuit Court, hinges upon the fact that the acts were done in the United States in the eastbound passenger traffic. This would really mean domestic trade, since all competition for passengers would be in the United States. The decision of the *United States* v. *Pacific and Arctic Railway and Navigation Company* modifies considerably the earlier case of the *American Banana Company* v. *United Fruit Company*, in that it says that, though part of the act is beyond the borders of the United States, it is not thereby extra-territorial, because, if it were so, no government would have jurisdiction. "If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations" (p. 106). Then came the "rule of reason" principle made famous by the Standard Oil Company and the American Tobacco Company cases. This principle found its application to foreign commerce in the *United States* v. *Hamburg-American S.S. Lines* case, which declared that "fighting ships" were unreasonable restraint of trade, but that a partition of business was not. The next year in the *United States* v. *Prince Line*, the court held, in harmony with the above decision, that a sharing of ocean-carrier

business which insures regular sailings, and "affords shippers a fair rate so that they may meet competition in foreign trade," was not unreasonable restraint of trade.

This last case brings the line of decisions up to 1915, a year after the movement was definitely launched to legalize combinations for export trade. What have the court decisions done to interpret the vague phrases in the Sherman law referring to foreign commerce? It is only fair to say that there is chaos in these decisions. The first case, before the Circuit Court, apparently assumed the full application of that law to both export and import trade. In the following year the Supreme Court excluded the cases analogous to export trade, and the cases of import trade in which the acts were done under foreign jurisdiction. The Wilson act provisions were never invoked. If the decision in *United States* v. *Pacific and Arctic Railway and Navigation Company* were followed logically, both export and import trade would fall within the terms of the Sherman law. The cases attempting to apply the rule of reason are of no help. There can be no doubt, therefore, that the courts have needed more definite guidance.[1]

PANAMA CANAL ACT OF 1912

In the laws contemplating the opening of the Panama Canal this very same issue strikes through. It was inevitable, of course, that the rise of international relationships should bring forth this persistent query. Hence paragraph 4 of the Panama Canal act of 1912 reads:

> No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce Taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supple-

[1] Two attorneys-general have passed judgment on this question—one for, and one against.

menting the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Anti-Trust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four.

What lies behind this bit of federal legislation? Three kinds of traffic pass through the canal: traffic of the coastwise trade, foreign traffic, and export and import traffic. The Panama Canal act merely declares that the anti-trust laws shall hold jurisdiction over the canal commerce. Nothing to indicate whether the anti-trust laws apply to these three kinds of traffic, or to any part of them, appears.

THE FEDERAL TRADE COMMISSION

The first great victory by the government under the Sherman law was the Standard Oil Company case in 1911. This decision came after a considerable period of anti-trust agitation, and contained the famous "rule of reason" principle. There followed soon afterward the dissolution of the American Tobacco Company. At last the big trusts had been declared unlawful by the highest legal authority in the country. "Big Business" became a familiar household phrase; interest and curiosity were aroused; "the people" wanted to know what was truth and what was error in regard to the trusts. Out of this desire came the agitation for further legislation, which materialized in the Federal Trade Commission and the Clayton act.

This commission, in the words of President Wilson, was to act "only as an indispensable instrument of information and publicity, as a clearing house for facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all equities and circumstances of the case."[1] In section 6 (*h*) of the act creating this commission, it is granted the power "to investigate from time to time trade conditions in and with foreign countries where associations, combinations, or practices, of manufacturers, merchants or traders, or other conditions,

[1] President Wilson in speech at joint session of Congress, January 20, 1914.

may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

One of the first extensive investigations taken up by this commission was the subject of export trade. The Bureau of Corporations had already delved into the subject of trust laws and later issued a voluminous report on it under the title "Trust Laws and Unfair Competition." When the Bureau was transferred bag and baggage to the Federal Trade Commission, the work was continued, but concentrated in emphasis upon means of promoting export trade. The Commission followed up the suggestions made by business men to urge upon Congress the need of clarifying existing legislation, especially with respect to combinations for export trade. Members of the Commission appeared before the House Committee on the Judiciary at its sessions, July 18–20, 1916, and recommended a bill to permit co-operation in export trade. The results of the investigation together with the recommendations have appeared in a two-volume report, entitled *Co-operation in American Export Trade* (Government Printing Office, 1916). The study was begun in a period of slackening business, with attending circumstances of unemployment, lessened productivity, and poor markets. The home market could not take the entire output of the American producers. Manufacturers and merchants turned their attention to foreign markets and foreign competition. Help was sought from the Federal Trade Commission with the result that declaratory and permissive legislation was recommended. This Commission acting under its original instructions has urged a definitive law to exempt export trade from the Sherman act. It has gone on record as doubting the meaning of this latter law. In detail the Commission's recommendations are as follows:

> The Commission believes the American exporters should be enabled to compete in foreign markets on more nearly equal terms with foreign competitors. It also believes that the smaller manufacturers and producers, so far as they desire, should be enabled to share in such foreign business. It is convinced that for these purposes co-operation in export trade should be permitted. It knows that doubt as to the application of the anti-trust laws now prevents any marked development of such co-operation. It does not believe

that Congress intended by the anti-trust laws to prevent Americans from co-operating in export trade for the purpose of competing effectively with foreigners where such co-operation does not restrain trade within the United States, and where no effort is made to hinder American competitors from freely engaging in export trade. It is not reasonable to suppose that Congress meant to obstruct the development of foreign commerce by forbidding the use in export trade of methods of organization which do not operate to the prejudice of the American public, which are lawful in the countries where the trade is to be carried on, and which are necessary if greater equality of opportunity is to be afforded Americans in meeting foreign competitors. The Commission, therefore, respectfully recommends that Congress enact declaratory law and permissive legislation to remove the present doubt as to the law and to establish clearly the legality of such co-operations.[1]

THE CLAYTON ANTI-TRUST LAW

A second law was passed in 1914 affecting combinations and trusts; it was the Clayton bill, the avowed purpose of which was "to supplement existing laws against unlawful restraints and monopolies, and for other purposes." Section 1 of this act defines "commerce" as including interstate and foreign commerce, but not applying to the Philippine Islands. There is no other indication in the law, however, to show that foreign commerce is contemplated; in fact, the phrasing obviously restricts the prohibitions to transactions "for use, consumption or resale within the United States or any Territory thereof, or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States" (cf. sections 2 and 3). There is nothing in the Clayton law to aid in the interpretation of the Sherman law in its application to foreign commerce.

THE WEBB BILL

The agitation by American exporters for a clearer definition of federal legislation in its bearing upon export trade was launched at the first national foreign trade convention, held in Washington, D.C., May 27–28, 1914. In an address at that convention, Mr. J. D. Ryan, president of the Anaconda Copper Company, urged

[1] Federal Trade Commission report on *Co-operation in American Export Trade*, I, 379.

the need of definitive legislation on this question.[1] The matter was also taken up seriously by the Chamber of Commerce of the United States, a committee was appointed to report on the question at its next annual convention, and the National Foreign Trade Council began a campaign of education on the subject. A bill was finally drafted, following the recommendations of the Federal Trade Commission in its annual report of June, 1916, quoted above. This bill bears the name of Representative Webb, who introduced it, and who was at that time chairman of the House Committee on the Judiciary. On September 2, 1916, the Webb bill passed the House by a vote of 199 to 25, and was given over to the Senate with two brief amendments, the significance of which must be noted. The bill, as passed by the House, reads as follows:

AN ACT TO PROMOTE EXPORT TRADE, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares, or merchandise exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, *trading in, or marketing within* the United States or any Territory thereof of such goods, wares, or merchandise, or any act in the course of such production or manufacture.

That the words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or of the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

That the word "association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

SEC. 2. That nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such trade, or any agreement made, or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, *and does not restrain the export trade of the United States.*

[1] *Proceedings of First National Foreign Trade Convention,* pp. 161–71.

SEC. 3. That nothing contained in section seven of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineteen hundred and fourteen, shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States.

SEC. 4. That the prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibition contained in the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

SEC. 5. That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificates of incorporation or in its articles or contracts of association and of all contracts, agreements, and understandings had with any foreign or domestic association in regard to the conduct of or practices in foreign trade. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Purpose and provisions.—It is to be remembered that the primary purpose of this bill is to illuminate the twilight zone of the

Sherman Anti-Trust law, and to throw such light upon it that men will see beyond a shadow of doubt the legality of combining for export trade, that is, "solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation" (sec. 1). To attain this purpose it is specifically declared that the Sherman act and section 7 of the Clayton bill do not apply to "associations," that is, "any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations" (sec. 1), whose sole purpose is to engage in export trade and actually engaged solely in such trade (sec. 2).

Is the purpose accomplished in fact? There certainly can be little room left for doubt as to the intended meaning in the propaganda which preceded its passage. Those already engaged in foreign trade and many who desired that kind of business wanted to be free to combine in the most effective way—that is, in the way that would most expeditiously secure for the American manufacturers a large share of the foreign trade of the world. But as the bill passed the House, no such freedom is granted. There are two clauses that negative the entire bill. The first one is, "The words, 'export trade' shall not be deemed to include the production manufacture, *trading in or marketing within* the United States or any Territory thereof of such goods, wares, or merchandise, or any act in the course of such production or manufacture" (sec. 1). The second one is, "and does not restrain the export trade of the United States" (sec. 2). Evidently any kind of association must perform one of the following activities if it is to do any foreign business at all; it must engage in production, or manufacture, or trade, or marketing, in order to obtain goods, and specifically it is forbidden to do any of these things. Again, such combination or association as is contemplated must almost necessarily restrain export trade, at least as such restraint has been interpreted by the courts.

As soon as the Webb bill reached the Senate Interstate Commerce Committee its advocates began working for its passage with the objectionable clauses stricken out. Late in February the Senate Committee reported the bill to the Senate for debate and

vote, after having "eliminated the objectionable House amendments as recommended by the Federal Trade Commission."[1] The filibuster of the closing days of the Sixty-fourth Congress prevented its coming to a vote. And so the bill, whose "principle has been endorsed by the administration, by the Federal Trade Commission, by four national foreign trade conventions and a referendum of the Chamber of Commerce of the United States," was dead. There seems every reason to believe, however, that this measure will find an early hearing before the extra session of the new Congress.

What of the general provisions of the law? One is reminded as he reads it of a man attempting to balance himself on a narrow ledge. Eager to obtain the desired freedom, the framers still seem extremely fearful of asking too much. Seeking the power to combine abroad as their competitors in the foreign markets combine, they strenuously insist upon enforced competition at home. Methinks they do protest too much about domestic trade. And are not the requirements for "filing verified written statements" and the penalties placed upon transgression pretty heavy for a law that grants so great a freedom in export trade?

Significance of bill.—Of far greater importance, however, than the unskilful phrasing of the law is its significance as a piece of legislation. The Webb bill marks the break in a long, consistent series of legislative acts, both state and federal, running back to 1887. Control, regulation, restriction, destruction, had been the catchwords to express the popular antagonism toward big business. "Combinations" and "trusts," heretofore harmless and colorless words, acquired an almost sinister connotation. Courage was required to defend even the "good trusts" against utter annihilation. It certainly denoted a fairly radical change in popular attitude when a man dared to rise in open meeting to advocate legislation to legalize combinations in any form and in any way touching American business.

To be sure, the launching of the campaign for the Webb bill was well staged. Business conditions were bad in May, 1914, and had been bad for two years. No silver lining to the clouds of gloom

[1] Open Letter from National Foreign Trade Council, February 21.

were showing in the domestic market. Almost in desperation manufacturers lifted their eyes to foreign markets. And so the inspiration came to someone to call a meeting of foreign trade experts for the purpose of answering this query: "If there is no business to be done at home, why not go abroad?" Here is the answer:

> The solution of the problem is simple; the way is very clear. We ask that, in either of the two ways above suggested (by legislative enactment or by judicial interpretation), the law of the land shall be so interpreted that no restraint shall be placed upon American producers, manufacturers, or merchants to prevent them from entering into agreements or combinations affecting only the sale of their products in the markets of other nations. Given this release from an implied and unreasonable restraint, it will surely follow—as the day follows night—that the exportations of American merchandise will be notably stimulated, and that better prices will be obtained in foreign markets for the products of American mines, fields, and manufactories; and the business interests of this country, thus placed upon a footing of equality in foreign markets with the producers of those countries, will assume that due place in the field of commerce to which they are by nature entitled.[1]

"Greater prosperity through greater foreign trade" became the slogan. But greater foreign trade would not come for the mere asking; it must be won. There were markets in Europe for products such as the United States had for sale; but England, Germany, and France were largely in possession of them. South America held great possibilities; but England, Germany, France, and Italy were already there. There was the Orient, the "teeming millions" of China; but England, Germany, France, Japan, were there, too. With untold resources and advancing purchasing power Russia was awakening; but England, Germany, and France were already there. Some things the United States could sell because they were not easily procurable elsewhere; and there was always a great volume of food products and raw materials flowing outward with no competitive obstacles.

To win foreign trade, however, from our great, experienced, and well-equipped rivals is to be no child's play. Advantages, to be sure, we do have, very important advantages—in native capacity to organize and to push business, in financial strength, in resources,

[1] *National Foreign Trade Convention*, May 27–28, 1914, pp. 170–71.

in a vast home market. But the foreign game is not played by rules of our setting. The rivals to be met are adroit, shrewd, persistent, and established. Behind them are the combined forces of finance, industry, and commerce. For years, they too have believed in greater prosperity through greater foreign trade; they too have organization, equipment, resources; and they have the freedom to combine in the most effective way. Combination alone can compete with combination. Individually, the American exporter is no match for the powerful foreign purchasing syndicates and selling organizations. "While it is not clear today precisely to what extent existing anti-trust laws would prevent such arrangements entered into in good faith, it is more than apparent that under the laws as they stand, American manufacturers are afraid to combine to enter the foreign field, and that if this condition is not remedied, the United States will not begin to take full advantage of present foreign trade opportunities."[1] Hence, the Webb bill is essential to our greater prosperity.

But the war has changed the situation completely since 1914. Through the exigencies of that conflict foreign trade came to us, well-nigh flooded us, with splendid prosperity in its wake. Apart from munitions and war food supplies, there came orders from neutral markets, from the very markets that the American exporters were planning to capture. Was the Webb bill to be given up? Not at all; the phraseology was changed from "get" to "hold," and it was argued just as strenuously that the bill was needed fully as much to hold as to get foreign trade.

Assumptions and arguments.—Underlying this course of reasoning, there are several assumptions and arguments that ask for attention. In the first place, there is the assumption that foreign trade, and export trade in particular, is essential to our continued and greater prosperity. "Foreign trade, being a vital element of domestic prosperity, concerns every citizen and should be fostered by governmental, commercial, transportation, and financial cooperation under a national business policy designed to muster every resource to its maintenance and development."[2] This trade, say

[1] *Report of Chamber of Commerce of the United States*, p. 6.

[2] James A. Farrell, *Second National Foreign Trade Convention*, p. 162.

the advocates of the bill, must be in manufactured goods. "It is thus apparent that the future hope of our commerce, of its growth, or even of its maintenance at the high point which it held preceding the war, must depend upon manufactures, and that the exportation of the products of our factories must increase in a way in which they can take the place of the decreasing shares which foodstuffs and raw materials form in the export trade."[1] As a matter of fact, the percentage of exported manufactured products to total exports was in 1870, 18½ per cent; in 1880, 14 per cent; in 1890, 21 per cent; in 1900, 35 per cent; in 1910, 44.85 per cent; and in 1914, 47.17 per cent. It may thus be seen that our exports of finished products had greatly increased without encouraging legislation. This is true, not alone in per cents, but also in volume, for the total value of manufactured exports was $70,040,000 in 1870 and $1,099,132,000 in 1914.[2] "The outstanding fact in the growth of the foreign trade has been the increased importance of manufactures."[3] "Of all our manufactured exports, about one-third is represented by mineral oil, iron, and steel and agricultural machinery."[4] "It is obvious, therefore, that in the future the exports of finished factory products, and of such raw or semi-manufactured materials as copper, cement, coal, etc., of which the country has abundant supplies available, must be more largely used to exchange for the needed products of other countries. It is in such lines that co-operative action can be made most effective in export trade."[5] It is further pointed out that extension of the bounds of our market will tend to stabilize business. The more universal the demand the less risk in demand fluctuations, is an elementary economic principle, just as a far-flung productive area makes for a stabilized output. When the demand is seasonal, it is well to have a market so wide that always somewhere one's goods are in season. Furthermore, there is not likely to be a business depression everywhere at once, and therefore a widened

[1] O. P. Austin, *The Americas*, December, 1916, p. 29. [2] *Ibid.*, p. 31.

[3] Federal Trade Commission report on *Co-operation in American Export Trade*, I, 20.

[4] W. H. Saunders, *Second Foreign Trade Convention*, p. 65.

[5] *Ibid.*, p. 21.

market steadies business and makes for uninterrupted employment. And if this principle holds true, it would follow that prices also would be made steadier. Whether the steadiness would come at a higher or a lower level in the domestic market is a mooted question.[1] It can only be answered with an "if," viz., if the foreign trade results in lowering the production and selling costs per unit of product, it may enable the domestic consumer to get a lower price, if it results only in an increased demand without a relative increase in supply, the domestic consumer may be obliged to pay more.

The manifest destiny of this country, it is argued, is to become a creditor nation. With money loaned abroad connections may be made more readily for promoting foreign commerce, both exports and imports. And closely related to this condition is the peculiar risk that we are likely to run at the close of the war, due to the fact that we have had an outpouring of gold from other nations, until we are now estimated to possess one-third of the world's supply. These fortuitous circumstances, says Mr. F. A. Vanderlip, may prove to be a grave danger to us.

> When the war is ended, we will find all Europe depleted of its gold, staggering under a weight of inflated bank and government paper, and under direct stress to rebuild its stock of gold. The point of attack will be our gold reserves. The methods will be every means known to trade and commerce by which merchandise, securities, and credits can be exchanged for gold. . . . . Efforts in the way of defense, such as excessive reserves or short-term foreign investments, must be as nothing when compared to what is possible, in the form of credits created by exports of produce and merchandise. . . . . There is the strength of our defense; its effective measure will be the size of our exports compared to our imports.[2]

A further good result from an increase in manufactured exports is the conservation of our natural resources. For years our great rivals have drawn from us vast quantities of raw materials and food products, making for the depletion of our forests, our mines, and our soil fertility. If our food products are conserved and our raw materials are fabricated, this country will be able to realize

[1] Cf. Hearings before the Com. on Jud. Ser., 48.

[2] *Third National Foreign Trade Convention*, pp. 432–33.

on our labor energy, our capital, and our manufacturing ability, as England and Germany have done on theirs.

Thus runs the reasoning underlying the assumption that foreign trade is essential to our continued and greater prosperity. It is probably not fair to represent the position as quite so mercantilistic, but it is not far wrong. The source of the movement for increased commerce with other nations, where we do all the selling, may very largely explain the earmarks of the mercantile theory, for there is combined in it a generalized desire of the individual manufacturer who is desirous of selling his wares. In other words, the above position is that of the typical and practical American manufacturer, who naturally does not see the broader or long-time issues, or that our international books must be made to balance in the end, or appreciate that more or less ideal economic federation of the world where each nation, like each individual, does that for which it is best fitted. This typical and practical American manufacturer has said in his heart, "I want to sell more goods, for that makes me more money. I shall sell goods in the foreign market just as I sell goods in the home market; that, too, makes me more money." There is the same sort of naïveté in the very human desire to hold to the gold that we now have, lest our credit system will break down. For surely nothing is more elementary or more profound than the principle that gold will go where it is needed, by devious ways if not by straight; it cannot be stayed.

None the less there is nothing in all this to overthrow the assumption that more trade, domestic and foreign, is greatly to be desired. Theorists cannot get far away from the "hard-headed" business man's position, that busy factories and increasing volume of trade at a profit per unit make for good times. Nor do these sound like the idle words of a novice: "Accepting the sound principle that commerce which will stand the test of time must rest on a fair exchange of values, our rightful share of the world's trade will be that to which our natural resources, developed by our enterprise and skill, entitle us. In short, the fitness of our products to meet the requirements of the rest of the world must continue to be the measure of the expansion of our foreign trade."[1] Year

[1] James A. Farrell, *The Future of Foreign Trade*, p. 3.

by year the conviction grows that our best and permanent trade for the future must be in manufactures, and that our manufacturing capacity now justifies our reaching out for new markets. It is inevitable, of course, for American manufacturers to seek a foreign outlet when the home market is replete or difficult. This is the feeling that forms the basis of the assumption that foreign trade is essential to our prosperity.

Granting foreign trade to be a desirable thing, how is it to be obtained? The prime essential, quickly answer the advocates of the Webb bill, is the power to combine, or in their more euphonious phrase, "the freedom to co-operate." Why? Because the other chief trading nations of the world permit and encourage combinations for export trade. "A further and very practical reason for encouraging and freeing American merchants in export trade is the fact that our strongest foreign competitors not only do this, but through a system of cartels, which are really trade unions among merchants, combinations antagonistic to the United States exist."[1]

In seeking business abroad American manufacturers and producers must meet competition from powerful foreign combinations often international in character (cf. iron and steel, glass, silk, watches). In Germany, Italy, Switzerland, Holland, Sweden, Belgium, Japan, and certain other countries where policies concerning industrial combinations are quite diverse from those of the United States, business men are much freer to co-operate and combine than in this country. They have developed numerous comprehensive combinations sometimes aided by their governments, which effectually unite their activities both in domestic and foreign trade. In England and Austria, though freedom to combine is considerably abridged under the law, important combinations have also been formed.[2]

In 1914, Germany had 600 cartels, embracing practically every industry in the empire; in France, Belgium, Italy, Russia, Austria-Hungary, Switzerland, Sweden, Greece, Argentina, Chile, and Ecuador, there were combinations in coal, iron, and steel, agricultural machinery, oil, sulphur, superphosphates, cement, matches, chocolate, embroidery, silk goods, watches, cotton goods, condensed milk, canned fish, currants, quebracho, iodine, cocoa, etc.[3] Great

[1] W. H. Saunders, *Second Foreign Trade Convention*, p. 61.

[2] Federal Trade Commission Report on *Co-operation in American Export Trade*, I, 4–5.

[3] *Ibid.*, p. 5.

Britain has been the great pioneer in foreign trade, and has succeeded wonderfully without highly developed "co-operative" organizations, and yet "in various important industries combinations have grown up."[1] These industries include coal, cement, electrical goods, cotton textiles, pottery, tobacco, wall paper, iron, and steel. The individual manufacturer stands no chance to succeed in foreign markets against such competitors even with encouragement at home; how much less can he hope to succeed when he is forced by fear of breaking our anti-trust laws to compete with all other Americans seeking the same market. His disadvantages in selling abroad are matched by his disadvantages in selling to foreign-buying syndicates at home. There is but one offer in the market, and he is played off against other American manufacturers until the price to foreigners falls below the price of domestic consumers.[2]

From these combinations, freedom for which is asked by the advocates of the Webb bill, will flow certain advantages, it is claimed, to all those who are now engaged in foreign trade, and to all those who plan to do so. These advantages are: (*a*) maintenance of highly organized export service at minimum cost to participants; (*b*) improved credit information and sounder financing of foreign sales; (*c*) survival of initial loss during early period; (*d*) assumption of credit extension with manufacturers; and (*e*) more advantageous traffic contracts, customs brokerage, warehousing, etc.[3] The large manufacturers, who are now doing an extensive foreign business, can through combinations enter fields where trade in their products does not now, and is not likely to justify an independent sales organization. The small manufacturers will be able to pool their interests and finance foreign sales.

These desired results can be obtained, it is claimed, in competing, non-competing, and allied lines. For proof, the experience of the other countries is referred to, and the instances in this

[1] Federal Trade Commission Report on *Co-operation in American Export Trade*, I, 6.

[2] Cf. *First Foreign Trade Convention*, p. 163; Federal Trade Commission Report on *Co-operation in American Export Trade*, I, 7.

[3] Cf. *Report of National Foreign Trade Council*, "The Webb Bill."

country where it has been tried.[1] But the evidence is not convincing. In the first place, the conditions in other countries are not like the conditions here; laws, customs, traditions, and business methods are different. These countries do not have at home the drastic laws enforcing competition that we have. "They have developed numerous comprehensive combinations sometimes aided by their governments, which effectually unite their activities *both in domestic and foreign trade.*" Only England, perhaps, is analogous to us in commercial individualism. No valid deduction from the experience of other countries therefore can be drawn. The experience of American manufacturers affords too slender a basis for generalization. Logically, there would appear to be obstacles to combining competing manufacturers harmoniously for export trade, while they are living at home under conditions of enforced competition. Will the lion and the lamb lie down in peace together abroad, while retaining their original unfriendliness at home? Will competitors give sufficient information to a common selling organization of their actual costs to enable that organization to act intelligently? What if production costs on competitive goods are materially different? Will not the foreign policy of free combination of a manufacturing establishment be determined by the same group that formulates the domestic policy? And, after all, where does domestic trade end and foreign trade begin? "The distinction between domestic and foreign commerce is rapidly disappearing. No enterprise large enough to be called national can be clipped short at the boundaries of the Republic."[2] So long as this remains a theoretical question, the weight of logic is against its success.

If export trade is essential to prosperity, if export trade can be made successful only through "co-operation," and if, finally, "co-operative" plans have been successfully tried already in this country, what need is there for the Webb bill? The answer to this query is that American manufacturers are deterred from freely

[1] Cf. western lumber associations, steel products companies, and paper products manufacturers; also cf. "Suggested Methods of Co-operation in Foreign Trade," by National Foreign Trade Council.

[2] James A. Farrell, *The Future of Foreign Trade*, p. 2.

combining by the uncertainty of the application of our anti-trust laws. As has been pointed out, the wording of the law, and the poorly defined position of the courts fill the minds of the business men with doubt and fear. And nothing blights business activity more quickly than doubt and fear. The course of logic is therefore not closed without the "declaratory and permissive" legislation of the Webb bill.

No claim is made, however, that freedom to combine for foreign trade, alone, will bring the desired success to the American manufacturers, large and small. It is only one piece of timber in the framework of foreign trade; others are an American merchant marine, branch banks, better credit facilities, American investments abroad, and experience. These other things, which are greatly to be desired, may all come in the course of time and help to form the great co-operative organizations that are to work effectively under the Webb bill.

CONCLUSIONS

There appears to be something anomalous in the Webb bill, to legalize combinations, becoming a piece of legislation by the Democratic party and a measure for which a Democratic president spoke in warm commendation. In spirit and in principle the bill is not in harmony with the doctrines of that party. This fact leads one to question the thoughtfulness and foresight that lie behind its provisions and its passage. Born of a period of depression, when business men looked in desperation for live markets abroad, does it continue as a mere measure of expediency? That it is only part of a more extended plan is clear, for other parts appear in the movement for an American merchant marine and branch banks. Does the plan stop there? Can the plan stop with these things?

Several points arise in reply to these queries. In the first place, neither the passage of the Webb bill, nor the repeal of any laws alleged to be obstructing the growth of a merchant marine, nor the Federal Reserve Bank law will at once put the American manufacturers upon an actual equality with their greatest competitors in foreign markets. Organization, prestige, established channels of trade, intimate knowledge of the field, and a background of valuable experience are theirs. London is the world's financial center, and

the pound sterling is the known and acceptable medium of exchange around the world. The British merchant fleet is still the greatest by far on the broad seas; British banking facilities are everywhere; the British Board of Trade is fast centralizing and concentrating these world-encircling forces for fostering world-trade. But above all a Britisher is a Britisher, British goods are the best goods, British trade is the first desideratum in every hemisphere. With all their individualism, the English are thoroughly national as traders. Germany has long had a deliberate, dominating policy to extend her foreign commerce. She, too, has a merchant marine, branch banks, foreign agents, and a nation-wide system that compels the domestic market to bear the excess cost of foreign trade. Special combination rates take goods abroad; peculiar encouragement is given firms reaching out for foreign markets; government-nurtured cartels, price cartels, and selling cartels, tariff drawbacks, special arrangements with banks are parts of the system; and everywhere a German is a German, and German trade, German goods, German interests are first. Nationalism dominates the individual. Is the Webb bill the first deliberate step toward making such characteristics ours? If so, then no manner of safeguards are capable of, or desirable for, maintaining the *status quo* in domestic trade.

It is necessary to inquire further whether the propaganda for freedom to combine against foreign competitors is not an admission of the weakness or inefficiency of enforced competition. Once this admission is made the bars are down, for inefficiency runs back through the whole productive and distributive process. If combination only can meet combination in the foreign markets, then all those nations who are our competitors and who have the freedom to co-operate or combine at home as well as abroad, will still have a distinct advantage. The reasoning underlying the arguments for the Webb bill must be arbitrarily stopped or it will make for domestic conditions to match those of our great competitors. This means an abrogation of our existing anti-trust laws.

There has arisen some doubt also as to the position of the small manufacturer under the Webb bill. It has even been feared that his latter condition may be worse than his former. That he has his difficulties even to reach the foreign markets is obvious; he is

deficient in capital, in organization, in knowledge, in goods to supply a large and continuous demand. His weakness and helplessness are known. Suppose the privilege is granted him to "cooperate"; with whom can he make advantageous connections? If he combines with others in his own condition, may he not find that the "big manufacturers" have also combined, and that his condition is not greatly bettered? If he seeks associates among the "big manufacturers," what right has he to expect to be taken in on advantageous terms? If the struggle for foreign markets is to be a battle of the giants does the small manufacturer have a chance without being absorbed by a gigantic combination? These are the unanswered queries that cause doubt and fear.

The same policy cannot consistently advocate free trade, antitrust laws, and the Webb bill. One cannot argue to open our market freely to all the world, to restrain our own manufacturers and merchants from combining in our market, and at the same time uphold the bill to promote combinations for doing trade abroad. Foreign trade can only be essential to our prosperity on the basis of our being able to supply the home market demands without employing our full productive energy. And it is illogical to legislate to protect American manufacturers abroad while our laws permit them to be outflanked at home.

It is conceivable, after all, that competition in foreign markets might grow so keen in the future as to make production costs the absolutely deciding factor. If combination means efficiency in these costs, then the American manufacturers lose, even with the Webb bill. A merchant marine, branch banks, credit facilities, sales organizations will not save them.

There is no reason to believe that the advocates of the Webb bill contemplate any such wide-spread or drastic changes as suggested above. They appear primarily and wholly to be interested in the immediate measure because it will contribute to their success in competing with their rivals in foreign markets. With almost painfully obvious care, the law has been made to safeguard the existing laws that we have. And yet the Webb bill is in a sense an entangling alliance whose ultimate effect it is impossible to foretell.

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